

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-7064

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
No. 77-7064

MADAN GAUTAM,

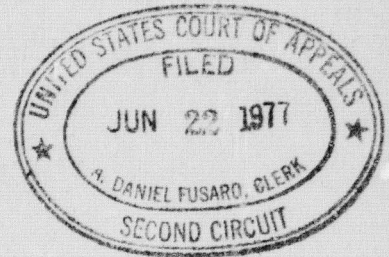
Plaintiff-Appellant,

—against—

FIRST NATIONAL CITY BANK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF FOR DEFENDANT-APPELLEE

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7064

MADAN GAUTAM,

Plaintiff- Appellant,

-against-

FIRST NATIONAL CITY BANK,

Defendant- Appellee

On Appeal From The United States
District Court For The Southern
District of New York

BRIEF FOR DEFENDANT -APPELLEE

Issue Presented

Whether the District Court, in dismissing plaintiff's action, properly found that plaintiff had failed timely to file his charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") as required by Section 706(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(e).

STATEMENT OF THE CASE

This is a Title VII action in which the plaintiff, Madan Gautam, asserts that he was denied employment by defendant Citibank (here sued as "First National City Bank") on account of his national origin.*

On this appeal, plaintiff seeks reversal of an order entered by the Hon. William C. Conner, of the United States District Court for the Southern District of New York, granting summary judgment in favor of defendant and dismissing plaintiff's complaint.

Based upon undisputed facts, the court below concluded that plaintiff failed timely to file his charge of discrimination with the EEOC, and that, in consequence, his action was barred.**

* All references made by plaintiff in his brief before this Court to 42 U.S.C. §1981 and purported race discrimination are irrelevant to this appeal. At no time before the District Court did plaintiff seek to assert a cause of action predicated on §1981 or to advance allegations of race discrimination. He may not raise a §1981 claim for the first time on appeal. See e.g., In Re Chinese Maritime Trust, Ltd., 478 F.2d 1357, 1359 n.1 (2d Cir. 1973), cert. denied, 414 U.S. 1143 (1974); United States v. Board of Education of Lincoln Cty., Ga., 469 F.2d 1315, 1316 (5th Cir. 1972); United States v. West Peachtree Tenth Corporation, 437 F.2d 221, 222-223 n.1 (5th Cir. 1971).

** Judge Conner's opinion is reported at 425 F. Supp. 579 (S.D.N.Y. 1976), and a copy thereof is included in the record on appeal.

It should be noted that at one point before the District Court, plaintiff sought to preserve his complaint by resort to the Equal Pay Act of 1963, 29 U.S.C. §206(d). This attempt to invoke a plainly inapplicable statute was rejected by the District Court (425 F. Supp. at 584 n.5, Opinion in the record at -b-n.5), and plaintiff is not here challenging this ruling.

STATEMENT OF FACTS

Plaintiff's Application for Employment

On May 16, 1974, plaintiff appeared at defendant's Professional Recruitment Office, at 399 Park Avenue, New York, New York, to submit his resume and apply for employment. Defendant's normal practice with respect to unsolicited professional job applicants was not to schedule interviews until an applicant's resume had been carefully examined, and a determination made as to whether any suitable position was available. As a matter of courtesy, however, plaintiff was allowed, before leaving, to speak briefly with one of defendant's professional recruiters.*

Upon reviewing plaintiff's resume, the professional recruiter forwarded it for further consideration to one of defendant's systems officers in its Operating Group - Support Services. This officer apparently informed the recruiter's office a few days later that he was not interested in hiring plaintiff in his area. Because the recruiter had by that time gone on vacation he did not immediately become aware

* See Affidavit of Lawrence J. Jansen, filed July 28, 1976 (hereafter "Jansen Affidavit"), paragraphs 2 and 3 and Exhibit 1. See also Plaintiff's "Opposition to the Defendant's Motion to Dismiss the Complaint", filed September 10, 1976 (hereafter "Plaintiff's First Opposition Memorandum"), pages 2 and 6; Plaintiff's "Opposition to the Defendant's Motion to Dismiss the Complaint (Amended)", filed September 28, 1976 (hereafter "Plaintiff's Second Opposition Memorandum"), page 2.

of this decision.*

On August 7, 1974, the recruiter received by mail another resume from plaintiff together with a cover letter. That same day, after consulting with the systems officer to whom he had forwarded the first resume, and after deciding that there were no appropriate job openings for plaintiff, the recruiter wrote a letter to plaintiff advising him that "upon reviewing our present personnel needs in the light of your interests and background, we have come to the reluctant conclusion that we cannot, at this point, encourage you in your employment search."**

The Proceedings Before the New York
State Division of Human Rights and
State Human Rights Appeal Board

On October 18, 1974, plaintiff filed a verified complaint with the New York State Division of Human Rights ("State Division") charging defendant (and the professional recruiter) with having unlawfully denied him employment on or about August 7, 1974 because of his national origin.*** The State Division investigated plaintiff's complaint, and on

* See Jansen Affidavit, paragraph 4.

** See Jansen Affidavit, paragraph 5, and Exhibits 2 and 3. See also Plaintiff's First Opposition Memorandum, pages 2 and 6, and Exhibit 2; Plaintiff's Second Opposition Memorandum, page 2.

*** See Jansen Affidavit, paragraph 6, and Exhibit 4. See also Plaintiff's First Opposition Memorandum, page 2.

December 6, 1974 issued a "Determination and Order after Investigation" dismissing the complaint for lack of probable cause.* The dismissal of plaintiff's complaint was affirmed by the New York State Human Rights Appeal Board in a Decision and Order dated June 30, 1975, and mailed to the parties in January, 1976.**

During the course of the State Division's investigation, plaintiff presented no evidence that defendant was engaged in any ongoing practice of refusing to hire persons of Indian national origin. Rather, to the degree plaintiff presented any evidence at all,*** it related to his own individual circumstances, and his employment rejection occurring no later than on or about August 7, 1974.

Defendant, for its part, submitted evidence to the State Division refuting plaintiff's allegations of dis-

* See Jansen Affidavit, paragraph 12, and Exhibit 10.

** See Jansen Affidavit, paragraph 13, and Exhibit 11. See also Plaintiff's First Opposition Memorandum, pages 3 and 5; Plaintiff's Second Opposition Memorandum, page 2.

*** Plaintiff's evidence was limited to statements made at a conference of the parties held by the State Division regarding his complaint on November 12, 1974. See Jansen Affidavit, paragraph 7, and Exhibit 5. See also Plaintiff's First Opposition Memorandum, pages 3 and 6, and Exhibit 1.

crimination,* and showing that it did consider and hire persons of Indian national origin. Defendant's presentation of evidence, for example, included a partial list of recent professional and trainee hires thought to be of Indian national origin; a partial list (together with resumes) of applicants thought to be of Indian national origin, who had been interviewed by the professional recruiter, and, in certain cases, been referred on to areas having job openings; and the resume of a person of Indian national origin actually offered a professional job position by the recruiter only some months before plaintiff's submission of his resume.**

Settlement Overtures by Plaintiff

While his state proceedings were still going forward, plaintiff made a number of settlement overtures to defendant. Plaintiff submits that, during the course of the conference convened by the State Division on November 12, 1974, he made "another formal request" to be hired, and was turned down.***

* Defendant submitted job descriptions, or requisition forms, of the jobs open at the time plaintiff applied for employment and for which he may have considered himself qualified, together with listings of the qualifications of the persons actually hired for these jobs. These documents, when examined together with plaintiff's resumes, plainly reveal that the successful candidates for the jobs all had more actual, specific experience and background for the jobs in question than plaintiff, and in consequence were better qualified. See Jansen Affidavit, paragraph 9, and Exhibits 1, 2 and 6.

** See Jansen Affidavit, paragraphs 10 and 11, and Exhibits 7, 8, and 9.

*** See Plaintiff's First Opposition Memorandum, page 6.

In addition, plaintiff engaged in a March, 1975 exchange with one of defendant's attorneys in an effort, once again, to settle the matter.*

None of these exchanges amounted to what could reasonably be considered new applications for employment. In any event, none of them took place within 300 days of the time plaintiff finally instituted proceedings before the EEOC.

Proceedings Before the EEOC

On February 23, 1976, plaintiff filed a charge of discrimination with the EEOC which, as the District Court observed, "echoed his complaint before the state commission."** Through apparent oversight, the EEOC never notified defendant of the charge's pendency, nor indeed of its ultimate disposition.***

Although the charge was not filed within 300 days of any purported attempt by plaintiff to gain employment with defendant, the EEOC inexplicably deemed it timely and issued on March 29, 1976 a Determination on the merits concluding

* See Defendant's "Reply Memorandum in Support of Defendant's Motion to Dismiss the Amended Complaint," filed September 21, 1976, Attachments A and B. See also Plaintiff's First Opposition Memorandum, pages 3, and 6, and Exhibit 3; Plaintiff's Second Opposition Memorandum, pages 1 and 2.

** 425 F. Supp. at 581, Opinion in the record at 4. For a copy of plaintiff's EEOC charge, see Affidavit of John M. Lewis, filed July 28, 1976 (hereafter "Lewis Affidavit"), Exhibit 1.

*** See Lewis Affidavit, paragraph 10, and Exhibit 4.

there was no reasonable cause to credit plaintiff's contentions.* This Determination, however, was not based on an independent investigation by the EEOC, but was grounded on the record developed by the State Division in late 1974.** Since defendant had not been given notice of the charge, it was never accorded the opportunity to advise the EEOC as to the charge's lack of timeliness.

* See Lewis Affidavit, paragraph 8, and Exhibit 2.

** See Lewis Affidavit, paragraph 9, and Exhibits 2 and 3.

SUMMARY OF ARGUMENT

This is an action in which plaintiff seeks to litigate a claim of discrimination under Title VII which was not timely presented to the EEOC. Plaintiff's claim essentially arises from defendant's refusal to hire him in or about August, 1974. Plaintiff, however, did not file his charge of discrimination with the EEOC regarding this claim until February 23, 1976 -- well beyond the 300-day period prescribed by Section 706(e) of Title VII. Accordingly it is clear that plaintiff failed to satisfy a necessary statutory prerequisite to suit, and the District Court properly deemed his action barred.

On this appeal, plaintiff advances basically two arguments in support of his position that the District Court erred in dismissing his action. As we read plaintiff's brief, he asserts that his claim is of a continuous nature, and that, in any event, equitable considerations exist which should have operated to save his case. Neither of these contentions has merit.

As we show in Part A of our Argument, the federal courts have consistently treated individual hiring refusal claims as devoid of continuous implications, and fully subject to Title VII's time requirements for filing charges with the EEOC. In this case, the hiring refusal complained

of was indisputably completed more than 300 days before plaintiff submitted his discrimination charge to the EEOC. There is, as the District Court found, no basis for plaintiff's contention, or the EEOC's conclusion, that plaintiff's claim was continuous and timely presented.

In Part B of our argument, we treat plaintiff's assertion that equitable considerations exist which should have led the District Court to deem his case properly instituted. As we demonstrate, the District Court properly concluded that even if it is assumed such considerations may enter into the application of Title VII's time requirements for EEOC charges, there was nothing in this case meriting resort to them.

ARGUMENT

THIS ACTION IS BARRED BY PLAINTIFF'S FAILURE TIMELY TO FILE HIS CHARGE OF DIS- CRIMINATION WITH THE EEOC

One of the prerequisites to the maintenance of a Title VII action is the filing of a timely charge with the EEOC. United Air Lines, Inc. v. Evans, ___ U.S. ___, 45 U.S.L.W. 4566, 4566 n.4 (U.S. May 31, 1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). See also Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 239-240 (1976).

Section 706(e) of Title VII, 42 U.S.C. §2000e-5(e), establishes a 180-day period within which a charge of discrimination must be filed. The sole statutory exception to the 180-day requirement is when a complainant "has initially instituted proceedings with a State or local agency...." In such circumstances, the complainant is accorded a lengthened filing period -- 300 days, or 30 days after receiving notice of termination of State or local proceedings, whichever is earlier.*

* Section 706(e) provides in pertinent part:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlaw-

In this case, the undisputed facts* reveal that plaintiff's EEOC charge was untimely submitted. Plaintiff received notice of his rejection for employment by defendant on or about August 7, 1974, and proceeded thereafter to file a complaint with the New York State Division of Human Rights. Because of this filing, plaintiff had, at a maximum, 300 days from on or about August 7, 1974 to file an EEOC charge. Plaintiff, however, did not file his charge until February 23, 1976 -- well beyond the established time limitation.

(Footnote continued from previous page)

ful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier...."

- * At various places in his brief, plaintiff urges that summary judgment was inappropriately granted for the reason that there exist unresolved factual questions. While there certainly is disagreement between the parties with respect to many of plaintiff's accusations, the material facts underlying the timeliness question here presented are indisputably established in the record. The District Court plainly was aware of the appropriate standards to be applied in considering an application for summary judgment (425 F. Supp. at 580-581, Opinion in the record at 2-3), and properly applied those standards here.

In support of his contention that his EEOC charge was timely, and that his case was properly before the District Court, plaintiff has advanced a number of arguments. First, plaintiff asserts that the alleged discrimination of which he complains is of a continuous nature. Second, he urges that equitable considerations exist which should have operated to spare his complaint from dismissal.

Both of these arguments were fully considered and properly rejected by the District Court in its well-reasoned opinion.

A. The Purported Discrimination Underlying Plaintiff's Action Related From the Outset to an Isolated Refusal to Hire and Contained No Elements of Continuing Discrimination

It is well established that an alleged discriminatory refusal to hire is ordinarily not considered a continuing violation. Thus, where a hiring refusal, as is the case here, does not "form[] one item in an ongoing series of violations with respect to ...[a] class...",* courts have not hesitated to treat the refusal as a discrete event, devoid of continuous implications, and fully subject to Title VII's filing time requirements. See, e.g., Smith v. Office of Economic Oppor. for St. of Ark., 538 F.2d 226 (8th Cir. 1976); East v. Romine,

* Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 518 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974).

Incorporated, 518 F.2d 332 (5th Cir. 1975); Molybdenum Corp. of Am. v. Equal Employment Op. Com'n, 457 F.2d 935 (10th Cir. 1972).

This is not a case where plaintiff's court pleadings and EEOC charge "allege a pattern of conduct apparently continuing to the time of filing the charge with EEOC and beyond...." Jamison v. Olga Coal Company, 335 F. Supp. 454, 459 (S.D.W. Va. 1971). See also Egelston v. State University College at Geneseo, 535 F.2d 752, 755 (2d Cir. 1976); Noble v. University of Rochester, 535 F.2d 756, 758 (2d Cir. 1976); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 987 (D.C. Cir. 1973). Rather, plaintiff's complaint and amended complaint raised only the issue whether defendant refused to hire him because of his national origin in or about May, 1974. Further, plaintiff's EEOC charge plainly related solely to the single refusal by defendant to hire him.* The charge contained no assertions of attempts by plaintiff subsequent to August 7, 1974 to obtain employment with defendant. Nor did it contain any allegations that defendant had refused employment to other persons of plaintiff's national origin as a regularly continuing practice.

* In the boxes of plaintiff's EEOC charge asking whether proceedings had been commenced with a State or local agency, plaintiff noted his October 18, 1974 invocation of the State Division's processes. This plainly indicates that plaintiff, when filing his EEOC charge, had in mind the matter previously referred to the State Division over a year before.

To be sure, in both plaintiff's original court complaint, and in his EEOC charge, the conclusory assertion was made that the discrimination complained of was continuous. As the District Court correctly recognized,* however, the mere "insertion of the word 'continuing' in an EEOC complaint, without more, does not raise a per se claim of continuing discrimination." Stroud v. Delta Airlines, Inc., 392 F. Supp. 1184, 1189 (N.D. Ga. 1975), aff'd, 544 F.2d 892 (5th Cir. 1977). Accord, Cisson v. Lockheed-Georgia Company, 392 F. Supp. 1176, 1182 (N.D. Ga. 1975).

Plaintiff places heavy emphasis in his brief on the fact that the EEOC dealt with his charge on the merits, and observed in its Determination that "timeliness...requirements have been met." The District Court, however, correctly assumed its duty independently to consider the timeliness question presented** and properly rejected the EEOC's erroneous conclusion.

* 425 F. Supp. at 582, Opinion in the record at 7.

** As the District Court stated (425 F. Supp. at 583-584, Opinion in the record at 9):

"This Court is not unmindful that 'the EEOC's findings are ordinarily entitled to great weight,' Weise v. Syracuse University, 522 F.2d 397, 413 (2d Cir. 1975). Nevertheless, although the EEOC finding of timeliness might normally stand as a formidable hurdle to success of the present motion, that hurdle is not necessarily insuperable -- i.e., the agency's determination does not perform conclude the matter here. See Weise v. Syracuse University, supra, at 413; Macklin v. Spector Freight Systems, Inc., supra, at 986."

As the District Court recognized, the manner in which the EEOC dealt with plaintiff's charge revealed the infirmity of that agency's timeliness decision. If the EEOC had actually considered plaintiff's charge as one raising a "fresh" claim, it would have conducted its own independent investigation. This, however, it did not do. Instead, the EEOC relied on the findings and record of the State Division, developed in late 1974, in arriving at its Determination. In short, insofar as "the matters the Commission proceeds to investigate... assist in determining the scope of the complaint for purposes of applying Title VII's jurisdictional requirements",* the guidance provided, as the District Court observed, "hardly aids plaintiff...."**

Further, the District Court recognized the inevitable taint placed on the EEOC's conclusion by that agency's failure to inform defendant of the pendency of plaintiff's charge -- a divergence from normal procedure which resulted in defendant being denied the opportunity of having the charge dismissed at the administrative level for untimeliness.

An additional factor to be considered in determining whether an EEOC charge may be construed as raising a claim of a continuous nature is whether the EEOC had before it, at any

* Macklin v. Spector Freight Systems, Inc., supra, 478 F.2d at 988.

** 425 F. Supp. at 584, Opinion in the record at 9.

time, "actual evidence of continuing discriminatory conduct." Cisson v. Lockheed - Georgia Company, supra, 392 F. Supp. at 1183. In this case the EEOC had no such evidence.* The agency considered the State Division's findings and record; and these materials not only reflected that plaintiff's individual claim was without merit, but also included evidence showing the defendant did hire qualified persons of Indian national origin into its professional job classifications, and that the recruiter with whom plaintiff had interaction did refer such persons for appropriate job openings.**

Plaintiff points out in his brief, as he did in papers submitted to the District Court, that subsequent to his August, 1974 hiring rejection by defendant, and after having instituted proceedings before the State Division, he made settlement overtures to defendant. Plaintiff acknowledges in his brief that no additional purported "applications" for employment were made by him subsequent to March, 1975.*** He seems to assert, however, that the settlement overtures which he did make -- or rather defendant's rejection of them -- somehow should be viewed as additional instances of alleged employment discrimination rendering his case timely.

* See Lewis Affidavit, paragraph 11, and Exhibits 5, 6 and 7.

** See Jansen Affidavit, paragraphs 7, 8, 9, 10 and 11, and Exhibits 5, 6, 7, 8 and 9.

*** See Plaintiff's brief at page 8.

The District Court promptly disposed of these contentions, concluding -- we submit correctly -- that even if it were assumed that any of these settlement rejections on the part of defendant could plausibly be considered as equivalent to a discriminatory refusal to hire, "[t]he critical fact remains...that the discriminatory acts thus identified by plaintiff occurred more than three hundred days before the filing of plaintiff's EEOC complaint."*

Lastly, plaintiff argues in his brief that his claim ought to have been considered by the District Court to be of a continuous nature because "[i]t is not the practice itself, but its effect which took toll, continuously on the plaintiff...."**. However, as the District Court correctly observed (425 F. Supp. at 583, Opinion in the record at 8):

"'Once a disparaging remark is made or a transfer is denied, or a demeaning work assignment is given' -- or, indeed, an application for employment is rejected -- 'it is, without more, a completed and isolated act: such practices' -- however long-lasting their repercussions may appear from the subjective viewpoint of the aggrieved -- 'do not give the Plaintiff a perpetual right to file charges before the EEOC.' Loo v. Gerarge, 374 F. Supp. 1338, 1340 (D. Haw. 1974); see Collins v. United Air Lines, Inc., 514 F.2d 594, 596 (9th Cir. 1975)."

* 425 F. Supp. at 583, Opinion in the record at 8-9.

** See Plaintiff's brief at 6.

In sum, as the facts indisputably show, the District Court properly concluded that the grievance underlying plaintiff's case lacked continuous thrust, and was not submitted to the EEOC within 300 days of its arguably latest occurrence.

B. There Exist No Equitable Considerations
Which Should Operate to Spare Plaintiff's
Case from Dismissal

Although the question apparently remains open in this circuit whether the time requirements for filing with the EEOC are preconditions to court jurisdiction, or rather analogous to statutes of limitations subject to equitable modification,* there is nothing in this case, as the District Court concluded, "to recommend a resort to equitable principles... that might spare plaintiff's complaint from dismissal."**

Plaintiff urges, it would seem, that his pursuit of state remedies, characterized by lengthy delay on the part of the New York State Human Rights Appeal Board in rendering its opinion, somehow should be deemed sufficient excuse for not meeting Title VII's explicit time requirements for filing of charges. Plaintiff's contentions, we submit, are entirely lacking in merit.

* Egelston v. State University College at Geneseo, supra, 535 F.2d at 755-756 n.5. But see, e.g., Weise v. Syracuse University, supra, 522 F.2d at 411-412 (2d Cir. 1975).

** 425 F. Supp. at 584, Opinion in the record at 11.

Plaintiff ignores the fact that Congress has expressly provided in Title VII an extended period of no more than 300 days for filing a charge with the EEOC in circumstances where complainants (like plaintiff) have "initially instituted proceedings with a State or local agency...." 42 U.S.C. §2000e-5(e). This enlarged period was intended, as the Supreme Court has recently stated, to stand as the "maximum possible extension of the limitations period applicable thereto...." Electrical Workers v. Robbins & Myers, Inc., supra, 429 U.S. at 240.

In this case, plaintiff was credited with the full time for filing which Congress contemplated would be appropriate in his circumstances. For the District Court to have somehow concluded that plaintiff was entitled to additional time would have been clearly to rule in a manner directly contrary to Congressional intent.

Plaintiff, moreover, is not aided by those cases which have applied equitable principles to toll Title VII's time requirements for filing with the EEOC.* In Reeb v.

* It should be noted that several of the cases in this regard cited by plaintiff, e.g., Sanchez v. Trans World Airlines, Inc., 499 F.2d 1107 (10th Cir. 1974) and Culpepper v. Reynolds Metals Company, 421 F.2d 888 (5th Cir. 1970), have been undermined by the Supreme Court's recent decision in Electrical Workers v. Robbins & Myers, Inc., supra, where it was held that the pursuit of contractual grievance procedures does not operate to toll the statutory period for filing with the EEOC.

Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975), for example, the court refused to apply the time requirements strictly, and held that they do "not begin to run ...until the facts that would support a charge of discrimination...[are] apparent or should ...[be] apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff." Reeb, supra, 516 F.2d at 931.

Plaintiff does not argue here -- nor can be argue -- that significant delay ensued between the occurrence of the facts underlying his claim of alleged discrimination and his awareness and interpretation of them. Indeed, as the facts incontestably show, plaintiff was informed that he was not going to be hired by defendant upon receipt of the rejection letter mailed to him on August 7, 1974, and, as the District Court observed, "regarded himself as the object of defendant's discrimination at least as early as August 1974."* Plainly, his time for filing his EEOC charge began to run from no later than August, 1974.

Nor does plaintiff's position gain support from EEOC v. Nicholson File Co., 408 F. Supp. 229 (D. Conn. 1976), a district court decision in this circuit. In that case, it was ruled that the filing of a complaint with the Office of Federal Contract Compliance ("OFCC") operates to

* 425 F. Supp. at 585, Opinion in the record at 11.

toll Title VII's filing period for charges.

In so holding, the court in Nicholson viewed the OFCC as a federal "screening agency", operating, in part, to channel complaints "to the federal agency...best equipped to investigate...[them]," and functioning as "one of the several [federal] government agencies which have jurisdiction over complaints of discrimination."* The Court's ruling was obviously grounded on the desire to avoid penalizing complainants who timely seek to invoke federal remedies, but who may not initially -- at least technically -- approach the appropriate federal agency.**

Here, however, in contrast to the circumstances present in the Nicholson case, plaintiff did not seek to invoke his federal remedies until well after the time prescribed by Congress for so doing. His situation, in consequence, differs materially from that of the complainant in Nicholson. As the District Court plainly recognized here, it had "no license to accommodate plaintiff's claim by blinking... at the limitation period defined by Congress."***

* 408 F. Supp. at 234.

** Indeed, this Court has ruled that a filing with the OFCC would be deemed a filing with the EEOC. Egelston v. State University College at Geneseo, supra, 535 F.2d at 755 n.4.

*** 425 F. Supp. at 585, Opinion in the record at 11.

Plaintiff's heavy reliance on Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), cert. granted, 97 S. Ct. 1097 (U.S. February 22, 1977) is also entirely misplaced. In that case, brought in part under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. ("the ADEA"), the court concluded that the 180-day period for filing a notice of intent to sue with the Secretary of Labor under 29 U.S.C. §626(d)(1) of the ADEA was not "jurisdictional", but analogous to a statute of limitations subject to equitable modifications. Further, the court held that the plaintiff in that case was entitled to equitable relief by way of tolling the notice period.

In arriving at this latter ruling, the court was influenced by the fact that, although the plaintiff's notice of intent to sue was technically not timely filed, the reality was that de facto fulfillment of Section 626(d)(1)'s essential purposes had been met: (1) the plaintiff had not been tardy in notifying the Department of Labor of her complaint, thereby enabling prompt attempts at conciliation of her matter; (2) the employer had received early notice of the plaintiff's allegations. In addition, the court was swayed by its view that the cause for the failure of the notice formally to be timely submitted was not due to any lack of diligence on the part of the plaintiff, but rather was attributable to conduct both of the Department of Labor and the employer.

In the present case, unlike Dartt, there was no arguable timely de facto invocation of appropriate federal remedies, such that the EEOC was presented by plaintiff with a fresh complaint to investigate and possibly resolve. Nor was defendant given early notice, or indeed any notice, of plaintiff's assertions under Title VII. Moreover, there was no conduct by defendant, or anyone else, which might have tended to prejudice plaintiff in the timely assertion of his federal rights. This is a case, quite simply, where plaintiff slept on his rights, and, as a consequence, lost his federal claim.

In conclusion, even if it is assumed that equitable considerations may enter into the application of Title VII's time requirements for EEOC filings, the District Court properly concluded that there was nothing here reflecting the need to resort to them.

As the District Court observed, "the time requirements set by Congress [in Title VII] were purposely designed to safeguard defendants, as well as the interested agencies and courts, against stale claims."* We respectfully submit that the District Court's dismissal of plaintiff's action was fully consonant with this important purpose.

* 425 F. Supp. at 584, Opinion in the record at 11.

CONCLUSION

For the reasons set forth above, we respectfully submit that the order of the District Court granting summary judgment and dismissing plaintiff's complaint should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Nina C. Augello being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age and reside at 39-62 48th Street
Sunnyside, New York

On June 22, 1977 , I served the attached

Brief For Defendant-Appellee
upon the following attorney(s) at the address designated by him (them) for that purpose:

Madan Gautam
500 Riverside Drive
New York, New York 10027

Said service was made by depositing 2 true copy of the attached Brief for Defendant-Appellee

enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York

Nina C. Augello
Nina C. Augello

Sworn to before me this

22nd day of June 1977

Orlando J. de Stronie
Notary Public

VITOLO J. de STRONIE
Notary Public, State of New York
No. 41-4517529
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1978